

IN THE MATTER OF  
JACKSONVILLE RETAIL DEVELOPMENT  
14227 Jarrettsville Pike  
Phoenix, MD 21131

RE: Application for Limited Exemption  
BCC, §32-4-108(b)(8)

\* BEFORE THE  
\* BOARD OF APPEALS  
\* OF  
\* BALTIMORE COUNTY  
\* Case No. CBA- 20-009

\* \* \* \* \*

### OPINION

This case comes to the Board of Appeals of Baltimore County on appeal of the final decision of the Director of Permits, Approvals & Inspections (“PAI”) granting a limited exemption under Baltimore County Code (“BCC”) §32-4-106(b)(8) for a “minor development that does not exceed a total of three (3) lots”.

A public hearing was held on January 7, 2020. InSite Real Estate, LLC (“InSite”), the Applicant, was represented by Adam M. Rosenblatt, Esquire and Venable, LLP. The Protestant, Manor Associates, L.P. was represented by Michael R. McCann, Esquire. A public deliberation was held on February 6, 2020.

### Factual Background

InSite is the contract purchaser of the property known as 14227 Jarrettsville Pike, Phoenix, MD (the “Property”) which is 1.641 acres +/- on the east side of Jarrettsville Pike, south of the intersection with Sweet Air Road. (Pet. Ex. 1). The Property is improved with vacant buildings. InSite proposes to raze the existing buildings and redevelop the Property with two (2) fast food uses: a Starbucks (approx. 2,300 sq. ft.) and a fast food restaurant to be named (2,942 sq. ft.). The zoning on the Property is Business-Light, Commercial Rural (BL-CR). The uses are permitted by right in the BL-CR zone.

Evidence

Patrick C. Richardson, Jr., PE was the sole witness on behalf of InSite. Mr. Richardson was qualified and accepted as a professional engineer with specific knowledge and experience with the Baltimore County development process and regulations. (Pet. Ex. 2). Mr. Richardson testified that he created the Site Plan for the proposed development (the "Site Plan"). (Pet. Ex. 1). He emphasized that the proposed uses are permitted as of right in the BL-CR zone. (Pet. Ex. 3). The Site Plan meets all the requirements for setbacks as well as the number, location and stacking of parking spaces required for food drive-thru's.

On August 26, 2019, Mr. Richardson filed an application for a limited exemption under BCC, §32-4-106(a)(1)(vi) for a "minor commercial structure". (Pet. Ex. 4). By letter dated October 16, 2019, the Director of PAI made a decision based on the Development Review Committee's ("DRC") recommendation (which recommendation arose out of the DRC meeting on September 17, 2019) that the project met the requirements of an exemption under BCC, §32-4-106(b)(8) for a "minor development not exceeding a total of three lots" (the "PAI Decision") (Pet. Ex. 5).

Despite originally requesting an (a)(1)(vi) exemption, InSite confirmed at the Board hearing that it was agreeable to a (b)(8) exemption. Toward that end, Mr. Richardson explained that this project met the definition of the term "minor development" as defined in both BCC, §32-4-101(aa)(1) and (3):

(aa) Minor development. "Minor development" means:

(1) A development without a public works agreement;

\* \* \* \* or

(3) A development in which the improvements are determined by the Director of Permits, Approvals & Inspections as minimal under §32-4-304(e) of this title.

In regard to BCC, §32-4-101(aa)(1), it was Mr. Richardson's opinion that, because there are no public improvements, that County would not require a public works agreement for this project.

Based on his years of experience in the Baltimore County Development process, it was Mr. Richardson's understanding that public improvements were those constructed in the public right of way. In support of that opinion, he produced the Baltimore County Public Works Agreement form and highlighted that this project does not have the types of improvements set forth in the list under Paragraph 4.B. (Pet. Ex. 6). Mr. Richardson testified that private well and septic would be used. Additionally, per the State Highway Administration ("SHA"), there will not be any improvements to state owned roads (i.e. Jarrettsville Pike).

In regard to BCC, §32-4-101(aa)(3), Mr. Richardson explained that in deciding whether the improvements are minimal under BCC, §32-4-304(e), the Director of PAI looks to the cost to build the improvements. In support of that opinion, Mr. Richardson produced the Baltimore County Bureau of Development Plans Review Policy Manual (circa Feb. 22, 2002) (the "Plans Review Manual"). (Pet. Ex. 7). The Plans Review Manual instructs that the Director of PDM (now PAI) may waive the requirement for a public works agreement if it is determined that the improvements are less than \$50,000.00. (Pet. Ex. 7). Mr. Richardson testified that, because the Bureau of Plans Review attended the DRC meeting on September 17, 2019, and because a (b)(8) exemption was recommended by the DRC, this is evidence that the Director of PAI determined that the improvements for this project are less than \$50,000.00.

On cross examination, Mr. Richardson admitted that new storm drains and gutters would be installed, that the Property would be paved, and that landscaping and lighting would also be needed. He further agreed that grading under an SHA permit would be needed in order to widen the entrance to the development. (Prot. Ex. 1). SHA may also require a traffic impact study to be completed pursuant to COMAR 11.04.05.02.K. (Prot. Ex. 1 and 2). He agreed.

Mr. Richardson also acknowledged that the Baltimore County Department of Environmental Protection and Sustainability ("EPS") has environmental concerns as set forth in their letters dated September 18, 2018 and February 27, 2019 to Hydro-Terra Group, an environmental group retained by InSite. In its September 18, 2018 letter, EPS expressed its concern about both the volume and quality of water which will be generated by the proposed project in that the current well and septic servicing the Property may not be adequate. (Prot. Ex. 3). EPS is also concerned that the proposed location of the new well does not meet state or county standards. (*Id.*). EPS was equally concerned that the proposed project may potentially impact the yield of neighboring wells. As a result, EPS indicated that it would not support any project where intensification of water usage would jeopardize the needs of existing uses. EPS pointed out that neighboring Manor Shopping Center has well yield problems requiring it to haul in water to support its demand. Manor Shopping Center wells also had elevated levels of chlorides.

In its February 27, 2019 letter, EPS stated that the proposed usage would result in a 10-fold increase in water consumption and associated sewage discharge. (*Id.*). EPS expressed further concerns about the location of proposed sewage disposal areas because it is up-gradient from substandard wells which were drilled in the 1970s. Due to the location and volume of wastewater from the proposed uses, EPS stated that it was concerned that water quality in those

**In the matter of : Jacksonville Retail Development - Applicant**  
**Case No : CBA-20-009**

wells may be adversely impacted. EPS added that a variance from Maryland Department of the Environment ("MDE") may be required. EPS continued to express concern in that letter about the impact on the well yield for Manor Shopping Center. EPS requested certain testing be performed and a detailed scaled plan be prepared by a licensed surveyor. Mr. Richardson's response was that Hydro Terra was working with EPS on these concerns.

On cross examination, Mr. Richardson acknowledged that his understanding of "public works agreement" (as being those improvements constructed in the public right of way) is different than the definition in BCC, §32-4-101(oo): "...an agreement between the county and the applicant for the construction of public improvements or private improvements required by the County." Further, he agreed that "public improvements" as defined in BCC, §32-4-101(nn) means: "...improvements required by the county as a condition of development that are intended to be dedicated to the county in fee simple or by other interest in title." Finally, he acknowledged that "private improvements" are defined under BCC, §32-4-101(mm) as: "...improvements required by the county as a condition of development that are not intended to be dedicated to the county."

**Protestants Case.**

David Palmer, 3606 Jackson Cabin Rd., Phoenix, MD 21131, which property lies approximately 3/10 of a mile from the Property. Mr. Palmer testified on behalf of the Greater Jacksonville Association pursuant to Rule 8 papers ("GJA"). Given the discharge of thousands of gallons of gas from Exxon in Jacksonville in 2006 which polluted the aquifer in Jacksonville area, the GJA has concerns about water quality in this area. GJA highlights that the proposed usage is inconsistent with the Jacksonville Plan which was incorporated into Master Plan 2020. The Jacksonville Plan lists fast food restaurants as "inappropriate uses of land."

**In the matter of : Jacksonville Retail Development - Applicant**  
**Case No : CBA-20-009**

Casey Brooks whose address is 14232 Jarrettsville Pike, Phoenix, MD 21131, he is the owner of Casey's Brookside Market which is 1½ miles from the Property. Mr. Brooks testified that the well for his property is located 20 ft. from the Property and he believes that the proposed use will have a negative impact on his business.

Rebecca Magaziner, 3523 Southside Ave., Phoenix, MD 21131. Ms. Magaziner echoed the same concern over the water quality and also indicated that traffic will be an issue for this use.

Edward Tillman, 15017 Manor Rd., Monkton, MD 21111. Mr. Tillman owns the commercial property on Jarrettsville Pike to the south west of the Property. Mr. Tillman is also concerned about water quality and the effect on his wells.

**Decision**

InSite is proposing two (2) uses (a Starbucks and a fast food restaurant) which the County Council has deemed are permitted as of right in a BL-CR zone pursuant to Baltimore County Zoning Regulations (BCZR) §230.1. As a result, notwithstanding the Protestants' contention that fast food restaurants are inconsistent with the Jacksonville Plan, or will cause more traffic, those issues can only be addressed by the County Council during a rezoning process (i.e. the Comprehensive Zoning Map Process ("CZMP")). This Board has no jurisdiction to change the uses deemed appropriate for this Property.

As addressed at the hearing, the narrow issue presented to this Board is whether InSite satisfied the criteria under BCC, §32-4-106(b)(8), for a minor development not exceeding a total of three lots. If granted, the exemption would allow InSite to avoid a community input meeting and a Hearing Officer's hearing as required by BCC, §32-4-201 *et seq.*

First, the evidence was undisputed that the property is one (1) single lot. Second, to meet the definition of “minor development” under BCC, §32-4-101(aa), there are three (3) options, two (2) of which were presented here:

(aa) Minor development. “Minor development” means:

(1) A development without a public works agreement;

\* \* \* \*

(3) A development in which the improvements are determined by the Director of Permits, Approvals & Inspections as minimal under §32-4-304(e) of this title.

InSite argued that this development is one without a public works agreement BCC, §32-4-101(aa)(1). The term “public works agreement” is defined as one required by the County for the construction of both public and private improvements. (BCC, §32-4-101(oo)). The terms “private improvements” and “public improvements” are also defined under BCC, §§32-4-101(mm) and (nn) respectively, as “improvements required by the County” and are either not dedicated to the County (private improvements) or dedicated to the County (public improvements).

In this case, Mr. Richardson’s testified that the County policy is not to require a public works agreement if there are no public improvements being constructed in the public right of way. On cross examination, Mr. Richardson conceded that the express definitions found in the BCC differ from his 30 years of experience as an engineer in obtaining exemptions under BCC, §32-4-106. As suggested by the Protestants here, Mr. Richardson’s testimony appears consistent with the prior version of BCC, §32-4-101(aa) which was found in BCC, §26-238(a) as follows:

Sec. 26-238. Public works agreement; public improvements.

(a) Except as provided in subsection (b) of this section, the county shall require the execution of a public works agreement to ensure completion of any public improvements and to allocate costs.

The Board finds that Mr. Richardson's testimony that private improvements constructed as part of this project (such as storm drains, curbs and gutters) are evidence that a 'public works agreement' is required under the BCC. While Mr. Richardson made clear that these private improvements will not be constructed in the public right of way, we find that the current definition in BCC, §32-4-101(aa) requires a public works agreement unless the evidence provided otherwise.

InSite argues that because a (b)(8) exemption was granted, PAI concluded that a public works agreement is not required here. (Pet. Ex. 5). However, we find that the PAI Decision leaves open the issue of whether a public works agreement is required here as the PAI Decision reads as follows:

Be advised that in addition to development plan review fees, Phase 2 fees will apply, **depending on** the amount of site disturbance, and/or **the requirement of a Public Works Agreement**.

(Emphasis Added). Consequently, it is clear to this Board that the County has not yet determined if a public works agreement is, or is not, required. As such, this Board cannot make this assumption.

With regard to BCC, §32-4-101(aa)(3), we find that there is no information in the PAI Decision that the improvements here are "minimal" under BCC, §32-4-304(e). (Pet. Ex. 5). The PAI Decision is silent as to whether the improvements are less than \$50,000.00. The PAI Decision does not inform this Board as to the Director's thoughts or reasoning that the definition of "minor development" under 32-4-101(aa)(3) has been met. While the Board recognizes that



**In the matter of : Jacksonville Retail Development - Applicant**  
**Case No : CBA-20-009**

the Bureau of Development Plans Review Policy Manual provides the Director of PAI with the authority to waive such a requirement, there is no evidence here in that regard. (Pet. Ex. 7).

Moreover, this Board, *In The Matter of The Application of Seven Kids, LLC*, Case Nos.: 99-199-X, CBA 99-127, and CBA 99-128 addressed the evidence needed to satisfy this factor. At the time of the *Seven Kids* case, BCC, 32-4-101(aa)(3) was formerly BCC, §26-168(cc) and read as follows:

“Minor Development” means:

\* \* \* \*

(3) a development in which the improvements are determined by the director of permits and development management as minimal under §26-239(b) of this article.

§26-239(b) states:

(1) The Director of Permits and Development Management may waive the requirement for a public works agreement if the Director determines that the public improvements are minimal.

(2) Minimal public improvements include:

- (i) fire hydrants;
- (ii) water or sewer extensions;
- (iii) storm drain extensions;
- (iv) curb, gutter or pavement projects;
- (v) traffic control devices; or
- (vi) other similar improvements.

In our *Seven Kids* Opinion, we held that the Board would need to know the basis for the Director of PAI’s decision that improvements were minimal and that the improvements were less than \$50,000.00 before granting an exemption under this factor. In that case, as here, there were no facts or reasoning expressed in the written decisions of PAI (formerly known as

In the matter of : Jacksonville Retail Development - Applicant  
Case No : CBA-20-009

Department of Permits and Development Management) as to whether the improvements were “minimal”. As a result, in *Seven Kids*, we said in pertinent part:

Since Mr. Jablon’s letters of June 11 and July 22, 1999 (the format of which has become standard) give no indication as to his thought processes in the determination made by him, nor the supporting facts and reasoning in granting or denying a (b)(9) exemption, it would be difficult, if not impossible, to determine what basis was adopted by him as dispositive. Not knowing what factors motivated the Director in this kind of circumstance to act pursuant to his “may” (or may not) “waive the requirement for a public works agreement if the Director determines” authority, the Board has no way of knowing what issues are to be heard, even if the appeal is on a *de novo* basis.

\* \* \* \*

Indeed, in *Seven Kids*, we urged a legislative and/or judicial review of the development regulations to:

.....require the Director, at the very least, to state the reasons and rationales supporting a granting or denial or an exemption under §26-171. If so altered, *de novo* appeals on those issues, or that matter, appeals based on whether or not the Director was arbitrary or capricious in utilizing or not utilizing those factors in making his decision, could be adequately addressed on appeal by the Board or a reviewing court.

Thus, we find that the evidence in this case did not satisfy the factors to meet the (b)(8) exemption.

Conclusion

After reviewing all of the testimony and evidence presented, the Board has determined that the Application for a Limited Exemption under BCC, 32-4-106(b)(8) should be denied.

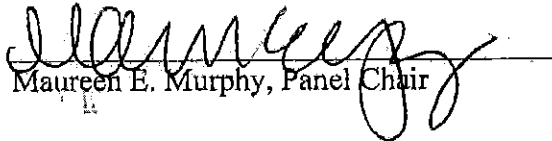
ORDER

THEREFORE, IT IS THIS 27th day of April, 2020 by the  
Board of Appeals of Baltimore County,

**ORDERED** that the Application for a Limited Exemption under BCC, 32-4-106(b)(8)  
be and the same is hereby **DENIED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-  
201 through Rule 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS  
OF BALTIMORE COUNTY**

  
Maureen E. Murphy, Panel Chair

See attached  
Jason S. Garber

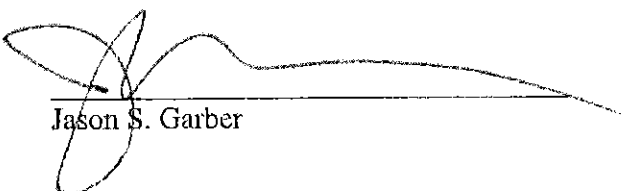
See attached  
Andrew M. Belt

In the matter of : Jacksonville Retail Development - Applicant  
Case No : CBA-20-009

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS  
OF BALTIMORE COUNTY**

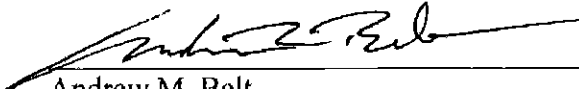
see previous  
Maureen E. Murphy, Panel Chair

  
Jason S. Garber

see attached  
Andrew M. Belt

In the matter of : Jacksonville Retail Development - Applicant  
Case No : CBA-20-009

See previous  
Jason S. Garber

  
Andrew M. Belt



## Board of Appeals of Baltimore County

JEFFERSON BUILDING  
SECOND FLOOR, SUITE 203  
105 WEST CHESAPEAKE AVENUE  
TOWSON, MARYLAND, 21204  
410-887-3180  
FAX: 410-887-3182

April 27, 2020

Adam M. Rosenblatt, Esquire  
Venable LLP  
210 W. Pennsylvania Avenue, Suite 500  
Towson, Maryland 21204

Michael R. McCann, Esquire  
Michael R. McCann, P.A.  
118 W. Pennsylvania Avenue  
Towson, Maryland 21204

RE: In the Matter of: *InSite – Applicant*  
*Jacksonville Retail Development*  
Case No.: CBA-20-009

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter. Due to COVID-19 the Board Members and staff are teleworking. You will see there are three signature pages to the Opinion, which do not align. We hope this does not create any confusion. Please let us know if you have any questions.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

A handwritten signature in cursive script, reading "Sunny Cannington", is written over a horizontal line.

Krysundra "Sunny" Cannington  
Administrator

KLC/taz  
Enclosure  
Duplicate Original Cover Letter

c: Ryan Solum/InSite  
Patricia Farley, General Partner/Manor Associates Limited Partnership  
C. Pete Gutwald, Director/Department of Planning  
Lloyd Moxley, Development Manager/PAI  
Michael D. Mallinoff, Director/PAI  
Nancy C. West, Assistant County Attorney/Office of Law  
James R. Benjamin, Jr., County Attorney/Office of Law